

## Self-Incrimination Practice Exam – Complete

1. The purpose of this practice exam is not to give hints on the actual exam, but to help students learn how to apply legal principles in a factual situation.
2. This practice exam may not address all the EPOs you are responsible for, or all the materials you must know to master an EPO. The student is responsible for knowing and mastering the EPOs.
3. These questions may be harder or easier than the exam. Remember the purpose is help the student learn to apply legal principles.
4. Students will find reviewing the answers - even the incorrect ones - will help them master the principles.

*The Legal Division hopes this practice exam helps you.*

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**NOTE:** Some programs do not have an EPO dealing with the 6<sup>th</sup> Amendment. Though some of the questions deal with the 6<sup>th</sup> Amendment, all students will benefit from reviewing *all* the questions.

1. Federal agents with probable cause that Smith was trafficking in child pornography went to his apartment to interview him. Although the agents intended to arrest Smith, they did not tell him of such, nor did they tell him he was their prime suspect. They met Smith at his apartment, told him they were conducting an investigation into child pornography, and asked him if there was a place they could speak privately. Smith took the agents to a nearby room. Once there, the agents informed Smith he wasn't under arrest and was not required to speak to them. They then questioned him regarding his knowledge of child pornography trafficking, but did not read him his Miranda rights before doing so. Twice during the interview, Smith left to use the bathroom, unaccompanied by the agents. Smith confessed, was arrested, and was charged with trafficking child pornography. At his trial, he made a motion to suppress the statements made during the interview, claiming that they were taken in violation of Miranda. According to the law, the motion to suppress will be:

- a. Granted, because at the time the questioning was conducted, the agents had focused in on Smith as a suspect.
- b. Granted, because the agents had probable cause to arrest Smith at the time of the interview and intended to arrest him following its conclusion.
- c. Denied, because until a suspect is actually arrested, Miranda warnings are not required.
- d. Denied, because the agents weren't required to give Miranda warnings to Smith in this situation.

**Answer to question 1.**

- a. Granted, because at the time the questioning was conducted, the agents had focused in on Smith as a suspect.

**INCORRECT:** A person is not placed in the functional equivalent of custody for Miranda purposes simply because that person is the focus of a criminal investigation and is being questioned by authorities. Berkemer v. McCarty. It is well settled that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda.

- b. Granted, because the agents had probable cause to arrest Smith at the time of the interview and intended to arrest him following its conclusion.

**INCORRECT:** An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. However, a law enforcement officer's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Berkemer v. McCarty. Since the agents' intent was unknown to Smith at the time of the interview, their intent could not have affected how Smith understood his position at the time of the questioning.

- c. Denied, because until a suspect is actually arrested, Miranda warnings are not required.

**INCORRECT:** Miranda warnings are required before questioning a suspect who is either under arrest "or otherwise deprived of his freedom of action in any significant way." Thus, there are times when a suspect must be read Miranda warnings, even though no actual arrest has been affected.

- d. Denied, because the agents weren't required to give Miranda warnings to Smith in this situation.

**CORRECT:** A person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first be provided Miranda warnings. If the individual is not in "custody," the warnings need not be given. To determine whether "custody" is present, courts use a totality of circumstances approach to determine how a reasonable man in the suspect's position would have understood the situation. Here, the totality of the circumstances show that Smith was not in "custody." Smith had complete freedom of movement during the interview. He was never handcuffed or otherwise physically restrained. He was told that he was not under arrest, as well as that he did not have to speak with the agents if he did not wish to.

2. A hiker notified Federal officers that marijuana was growing in a field next to Interstate 95. The officers went on foot to investigate. When they arrived, they noticed Jones standing in the middle of the field placing an unknown item into his backpack. The officers yelled at Jones to stop what he was doing and to come over to where they were standing. After identifying themselves as law enforcement officers, the officers told Jones he was being temporarily detained while they investigated the marijuana field. At that point, one of the officers asked Jones what he had placed inside the backpack. Jones admitted that it was marijuana from the field. The officers arrested Jones and marijuana was found inside the backpack. At trial, he filed a motion to suppress his statement regarding what was in the backpack, claiming that the officers should have read him his Miranda warnings before questioning him. According to the law, Jones' motion will be:

- a. Granted, because questioning was taking place after Jones' freedom of action had been deprived in a significant way, thus requiring Miranda warnings.
- b. Granted, because the officers suspected that Jones had marijuana in his backpack.
- c. Denied, because the officers were not required to give Miranda warnings to Jones in this situation.
- d. Denied, because until Jones was actually arrested, Miranda warnings were not required.

## Answer to question 2.

- a. Granted, because questioning was taking place after Jones' freedom of action had been deprived in a significant way, thus requiring Miranda warnings.

**INCORRECT:** Miranda warnings are required before questioning a suspect who is either under arrest "or otherwise deprived of his freedom of action in any significant way." Here, the officers were conducting a Terry stop, and Jones' freedom of movement was restricted. However, in Berkemer v. McCarty, the Supreme Court held that Miranda warnings are generally not required when a person is questioned during a routine stop pursuant to Terry, because such stops are not "custodial" for purposes of Miranda. In this case, because the statement made by Jones regarding what was in the backpack was made during a valid Terry stop, the officers were not required to read him his Miranda warnings before asking him that question.

- b. Granted, because the officers suspected that Jones had marijuana in his backpack.

**INCORRECT:** A person is not placed in the functional equivalent of custody for Miranda purposes simply because that person is the focus of a criminal investigation and is being questioned by authorities. Berkemer v. McCarty.

- c. Denied, because the officers were not required to give Miranda warnings to Jones in this situation.

**CORRECT:** As noted above, Miranda warnings are generally not required during Terry stops. This is so for two reasons: First, by their nature, Terry stops are presumptively temporary and brief. This is quite different from the stationhouse interrogation that Miranda was meant to address, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. Second, the typical Terry stop is public, at least to some degree. Passersby, on foot or in cars, witness the interaction of officer and suspect. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the suspect's fear that, if he does not cooperate, he will be subjected to abuse. The fact that only one or at most two policemen typically confront the detainee further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary Terry stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda itself. For these reasons, Miranda warnings were not required in this situation.

- d. Denied, because until Jones was actually arrested, Miranda warnings were not required.

**INCORRECT:** Miranda warnings are required before questioning a suspect who is either under arrest "or otherwise deprived of his freedom of action in any significant way." Thus, there are times when a suspect must be read Miranda warnings, even though no actual arrest has been affected.

3. Thomas was arrested for narcotics trafficking. Following his arrest, two Federal agents brought Thomas into an interrogation room, introduced themselves, and read him valid Miranda warnings. When they asked him if he understood his rights, Thomas stated “yes.” When they asked him if he would be willing to waive his rights and answer their questions regarding the narcotics charges, Thomas stated, “Go ahead and ask what you want, but I’m not putting anything in writing.” Thomas also waived his right to consult with or have a lawyer present. Thomas refused to sign a written waiver form the agents had available. During the interrogations, the agents began to suspect Thomas was involved in the homicide of an undercover Federal agent that had occurred a few weeks earlier. Disregarding the narcotics crimes, the agents began to question him about the unrelated homicide, and Thomas ultimately confessed to it orally. At his trial for the murder of the Federal agent, Thomas filed a motion to suppress his statements made during the interrogation. Which of the following statements regarding this motion is TRUE:

- a. By refusing to put anything in writing, Thomas effectively invoked his right to silence, thus making any subsequent oral statements he made inadmissible.
- b. Because Thomas’ waiver was not made in writing, it was not valid, thus making any subsequent statements regarding the murder of the Federal agent inadmissible.
- c. Because the agents did not inform Thomas that they would be questioning him about the murder of the Federal agent, his waiver was not voluntarily, knowingly, and intelligently given, and any statements made regarding the murder charge were inadmissible.
- d. Because Thomas validly waived his right to remain silent, the questions regarding the murder of the Federal agent could be used against him, even though the questioning initially concerned narcotics.

**Answer to question 3.**

- a. By refusing to put anything in writing, Thomas effectively invoked his right to silence, thus making any subsequent oral statements he made inadmissible.

**INCORRECT:** Thomas waived his right to counsel and also agreed to speak with the agents even though he did not agree to put anything in writing. With this waiver, the agents could lawfully question Thomas and the statements Thomas made are admissible.

- b. Because Thomas' waiver was not made in writing, it was not valid, thus making any subsequent statements regarding the murder of the Federal agent inadmissible.

**INCORRECT:** The mere refusal to sign a written waiver does not automatically render inadmissible all further statements made by the defendant. An express written statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly, intelligently, and voluntarily waived the rights delineated in the Miranda case.

- c. Because the agents did not inform Thomas that they would be questioning him about the murder of the Federal agent, his waiver was not voluntarily, knowingly, and intelligently given, and any statements made regarding the murder charge were inadmissible.

**INCORRECT:** The Supreme Court's holding in Miranda specifically requires that the police inform a criminal suspect that he has the right to remain silent and that anything he says may be used against him. As long as that warning has been given, a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.

- d. Because Thomas validly waived his right to remain silent, the questions regarding the murder of the Federal agent could be used against him, even though the questioning initially concerned narcotics.

**CORRECT:** In this case, Thomas received a valid rights advisement. He then voluntarily, knowingly, and intelligently chose to waive that right with regard to making oral statements to the agents. For the above reasons, the statements made by Thomas can be used against him in the murder of the Federal agent.

4. A Federal agent purchased narcotics from an unknown individual during a “buy-walk.” The agent saw the seller through the open doorway of the apartment while standing for two or three minutes within two feet of the seller in a hallway illuminated by natural light. A few minutes after the sale, the agent described the seller to a second agent as being “a Hispanic male, approximately five feet eleven inches tall, dark complexion, short black hair, crew-cut style, and having high cheekbones, and of heavy build.” The second agent, suspecting from the description that Moore might be the seller, left an arrest photograph of Moore at the office of the undercover agent, who viewed it two days later and positively identified Moore as being the seller of the narcotics. Moore was arrested and charged with distribution of narcotics. At his trial, he made a motion to suppress all evidence relating to the photograph, since the single photograph was unnecessarily suggestive and violated his Fifth Amendment rights to due process. According to the law, this motion will be:

- a. Granted, because the use of a single photograph to identify a suspect is always unnecessarily suggestive and a violation of the due process clause.
- b. Granted, because the use of a single photograph, without any emergency or exigent circumstances, is unnecessarily suggestive and violates the due process clause.
- c. Denied, because Moore’s due process rights were not violated by the use of the single photograph to identify him as the seller of the narcotics.
- d. Denied, because law enforcement officers are presumed credible under the Aguilar test for probable cause, thus any identification made by a law enforcement officer is reliable.



**Answer to question 4.**

- a. Granted, because the use of a single photograph to identify a suspect is always unnecessarily suggestive and a violation of the due process clause.

**INCORRECT:** Although identifications arising from single-photograph displays are generally viewed with suspicion by the courts, the key to any identification evidence is reliability. A single-photograph display is not ALWAYS unnecessarily suggestive. Only when there is a very substantial likelihood of irreparable misidentification will a due process violation be found. While it would have been better had the second agent presented the first with a photographic array including a reasonable number of persons similar to any person then suspected (thus enhancing the force of the identification and avoiding the risk that the evidence would be excluded as unreliable), this defect goes to the weight given the identification, not its admissibility.

- b. Granted, because the use of a single photograph, without any emergency or exigent circumstances, is unnecessarily suggestive and violates the due process clause.

**INCORRECT:** See the justification (a), above.

- c. Denied, because Moore's due process rights were not violated by the use of the single photograph to identify him as the seller of the narcotics.

**CORRECT:** The Supreme Court has noted that reliability is the linchpin in determining the admissibility of identification testimony. In determining the reliability of an identification, courts will look at (1) the opportunity to view the suspect, (2) the degree of attention on the suspect, (3) the accuracy of the description given, (4) the witness' level of certainty, and (5) the time between the identification and the confrontation. In this case, (1) the agent had ample opportunity to view Moore from a very close distance, (2) as a specially trained, assigned, and experienced agent, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest the seller, (3) the description was given to the second agent within minutes after the transaction, and included the seller's race, height, build, color and style of hair, and the high cheekbone facial features, (4) the agent positively identified Moore as the seller, and (5) the agent's description of the seller was given to the second agent within minutes of the crime, and the photographic identification took place only two days later.

- d. Denied, because law enforcement officers are presumed credible under the Aguilar test for probable cause, thus any identification made by a law enforcement officer is reliable.

**INCORRECT:** The Aguilar test for probable cause is irrelevant for purposes of identification evidence. As noted above, the key to any identification evidence is the reliability of the identification, based on the five factors noted.

5. Smith was arrested for receipt of child pornography. Following his arrest, two Federal agents arrived at the holding facility to interview him about the crime. After properly providing Smith his Miranda rights, the agents asked him if he wished to waive his rights and speak with them. In response, Smith asked, "If I talk to you, will it help me out later?" The agents told Smith that if he spoke with them, they would "make his cooperation known to the United States Attorney." Smith then waived his rights and questioning began. During questioning, the agents falsely told Smith that they had interviewed another man who had confessed and implicated Smith in the crime. Upon hearing this, Smith confessed. At his trial, Smith made a motion to suppress his confession on two grounds: First that his waiver had been coerced because of the agents' statement regarding his cooperation; and second, his statement had been coerced by the lies the agents told him during the interview. Based on the above, which of the following statements is TRUE:

- a. Smith's statement was voluntarily given and can be introduced against him at trial, even though the agents falsely told Smith they had interviewed a witness who had implicated him in the crime.
- b. Smith's subsequent statement was coerced and cannot be introduced against him at trial, because the agents falsely told Smith they had interviewed a witness who had implicated him in the crime,
- c. Smith's waiver of rights was coerced and the statement cannot be introduced against him at trial, because the agents told Smith they would make his cooperation known to the United States Attorney if he spoke with them.
- d. Smith's statements may be introduced against him at trial, because once a law enforcement officer properly advises a suspect of his Miranda rights, any subsequent confession by the suspect can be used against him at trial.

**Answer to question 5.**

- a. Smith's statement was voluntarily given and can be introduced against him at trial, even though the agents falsely told Smith they had interviewed a witness who had implicated him in the crime.

**CORRECT:** Deception by law enforcement officers during an interrogation to get the truth does not automatically amount to coercion. Indeed, law enforcement officers commonly engage in such ruses as suggesting to a suspect that an accomplice has just confessed or that the officers have or will secure physical evidence against the suspect. The key inquiry is whether the actions of the law enforcement officers would overbear an individual's will to resist. Of note, it should be remembered that the voluntariness of a confession is distinct from the voluntariness of a waiver of Miranda rights. The Supreme Court has noted that any waiver of Miranda rights must be the product of a free and deliberate choice, rather than intimidation, coercion, or deception.

- b. Smith's subsequent statement was coerced and cannot be introduced against him at trial, because the agents falsely told Smith they had interviewed a witness who had implicated him in the crime,

**INCORRECT:** See justification (a), above.

- c. Smith's waiver of rights was coerced and the statement cannot be introduced against him at trial, because the agents told Smith they would make his cooperation known to the United States Attorney if he spoke with them.

**INCORRECT:** A defendant's waiver of Miranda rights must be made voluntarily, knowingly and intelligently. The voluntariness inquiry turns on whether, under the totality of the circumstances, the confession was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. It is not improperly coercive conduct for an agent to tell a suspect that the prosecutor will be informed of his cooperation and will evaluate his case in light of his cooperation. An agent's statement or promise to a defendant that the prosecutor would be told of the defendant's cooperation does not transform a defendant's otherwise voluntary statement into an involuntary one. In sum, the government is not forbidden to "buy" information with honest promises of consideration.

- d. Smith's statements may be introduced against him at trial, because once a law enforcement officer properly advises a suspect of his Miranda rights, any subsequent confession by the suspect can be used against him at trial.

**INCORRECT:** Regardless of whether Miranda warnings are required, to be admissible, every suspect's confession must be voluntary. In considering whether a confession was voluntary, the determinative question is whether the confession was extracted by threats, violence, or promises (express or implied), such that the defendant's will was overborne and his or her capacity for self-determination was critically impaired. Thus, even if Miranda warnings have been provided, subsequent threats, force, or promises can invalidate a suspect's confession.

6. Marcus was arrested at a motel for sexual assault. Officers sought to question him and read him his Miranda warnings. When he indicated he wanted to speak to a lawyer, the interview was terminated and Marcus was booked into the jail. Shortly thereafter, Marcus contacted one of the jailers and said that he needed to talk to somebody “about a murder.” Marcus was removed from his cell and taken to an interview room. Two officers arrived, and asked Marcus if he had something he wished to discuss with them. Marcus replied that he had information about a murder that had taken place a few days earlier. The officers then informed Marcus of his Miranda rights. Marcus indicated he understood these rights, signed a waiver, and Marcus confessed to being an accomplice to the murder. At his trial for murder, Marcus made a motion to suppress his confession, claiming the questioning that occurred after he had requested counsel violated his Miranda rights. According to the law, Marcus’ motion will be:

- a. Granted, because the officers violated his Miranda rights by questioning him after he had invoked his right to counsel.
- b. Granted, because Miranda warnings and waiver are not sufficient to waive a Sixth Amendment right to counsel.
- c. Denied, because the officers did not violate his Miranda rights by questioning him after he had invoked his right to counsel.
- d. Denied, because the officers were questioning Marcus about a different crime than the one for which he had previously invoked his right to counsel.

**Answer to question 6.**

- a. Granted, because the officers violated his Miranda rights by questioning him after he had invoked his right to counsel.

**INCORRECT:** In Edwards v. Arizona, the Supreme Court held that once an accused has invoked his right to counsel during a custodial interrogation, he may not be subjected to further police interrogation until counsel has been made available to him, “unless the accused himself initiates further communication, exchanges, or conversations with the police.” In this case, Marcus initiated the conversations with the officers. Once they read him his Miranda rights and obtained a valid waiver of those rights, they were free to question him without the presence of an attorney.

- b. Granted, because Miranda warnings and waiver are not sufficient to waive a Sixth Amendment right to counsel.

**INCORRECT:** As a general matter, an accused who has been provided his Miranda rights has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver will be considered a knowing and intelligent one for purposes of the Sixth Amendment. Patterson v. Illinois.

- c. Denied, because the officers did not violate his Miranda rights by questioning him after he had invoked his right to counsel.

**CORRECT:** In Edwards v. Arizona, the Supreme Court held that once an accused has invoked his right to counsel during a custodial interrogation, he may not be subjected to further police interrogation until counsel has been made available to him, “unless the accused himself initiates further communication, exchanges, or conversations with the police.” In this case, Marcus initiated the conversations with the officers. Once they read him his Miranda rights and obtained a valid waiver of those rights, they were free to question him without the presence of an attorney.

- d. Denied, because the officers were questioning Marcus about a different crime than the one for which he had previously invoked his right to counsel.

**INCORRECT:** In Arizona v. Roberson, the Supreme Court extended the Edwards rule to apply to situations where the police want to interrogate the suspect about an offense that is unrelated to the subject of their initial interrogation. Thus, once a suspect in custody invokes his right to counsel, no further police interrogation regarding any crime may occur unless the accused himself initiates further communications, exchanges, or conversations with the police.

7. Morgan was arrested for bank robbery and taken to an initial appearance, where he requested that a lawyer be appointed to represent him. This request was approved, and a lawyer was appointed to represent him. Following a detention hearing, he was released on bail. Approximately two days later, Federal agents, suspecting that Morgan was also involved in narcotics trafficking, went to his home to interview him about that offense. Upon arrival, the agents introduced themselves and asked Morgan if he would answer their questions. He agreed, and ultimately admitted that he had been involved in narcotics trafficking. At no time did the agents provide Morgan his Miranda warnings. At his trial for narcotics trafficking, he filed a motion to suppress his statement, claiming that his Sixth Amendment right to counsel had been violated by the interview that took place after counsel had been assigned to represent him at his initial appearance. According to the law, which of the following statements is TRUE:

- a. The agents violated Morgan's Fifth and Sixth Amendment rights to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.
- b. The agents did not violate either Morgan's Fifth or Sixth Amendment rights to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.
- c. The agents violated Morgan's Sixth Amendment right to counsel by initiating contact and questioning him without notifying the attorney that had been appointed to represent him.
- d. The agents violated Morgan's Fifth Amendment right to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.

**Answer to question 7.**

- a. The agents violated Morgan's Fifth and Sixth Amendment rights to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.

**INCORRECT:** The Supreme Court has repeatedly emphasized that Miranda warnings are due only when a suspect interrogated by the police is "in custody." In this case, the agents did not violate Morgan's Fifth Amendment right to counsel because he was not in custody at the time of the questioning. The Sixth Amendment right to counsel is "offense specific" and does not attach until a prosecution is commenced (i.e., at or after the initiation of adversarial judicial criminal proceedings, such as by way of indictment, information, or initial appearance). Thus, Morgan's 6th Amendment right to counsel regarding the bank robbery attached at the initial appearance. However, in this case, the agents did not violate Morgan's Sixth Amendment right to counsel because no formal charges had yet been filed on the narcotics charge.

- b. The agents did not violate either Morgan's Fifth or Sixth Amendment rights to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.

**CORRECT:** Morgan had neither a Fifth nor Sixth Amendment right to counsel when the questioning concerning the narcotics offense was conducted. The agents did not violate Morgan's Fifth Amendment right to counsel because he was not in custody at the time of the questioning. Similarly, the agents did not violate Morgan's Sixth Amendment right to counsel because no formal charges had yet been filed on the narcotics charge.

- c. The agents violated Morgan's Sixth Amendment right to counsel by initiating contact and questioning him without notifying the attorney that had been appointed to represent him.

**INCORRECT:** The Sixth Amendment right to counsel is "offense specific" and does not attach until a prosecution is commenced (i.e., at or after the initiation of adversarial judicial criminal proceedings, such as by way of indictment, information, or initial appearance). In this case, Morgan's Sixth Amendment right to counsel had attached for the armed robbery charge, because he had already been to an initial appearance. However, because no formal charges had yet been filed on the narcotics charge, he had no Sixth Amendment right to counsel for that offense.

- d. The agents violated Morgan's Fifth Amendment right to counsel by initiating contact and questioning him without first notifying the attorney that had been appointed to represent him.

**INCORRECT:** The Supreme Court has repeatedly emphasized that Miranda warnings are due only when a suspect interrogated by the police is "in custody." In this case, the agents did not violate Morgan's Fifth Amendment right to counsel because he was not in custody at the time of the questioning.

8. Davis was suspected of sending threatening letters to a Federal judge. After a Federal grand jury was convened to investigate, Davis hired an attorney to represent him. Two days later, a grand jury subpoena was issued to Davis directing him to provide handwriting samples for comparison with the letters that had been received in evidence. Without first notifying Davis' attorney, two agents arrived at Davis' house, served the subpoena upon him, and obtained handwriting samples from him. Handwriting analysis showed that Davis was the individual who had written the threatening letters. At trial, Davis made a motion to suppress all evidence related to the handwriting samples he had submitted. According to the law, which of the following statements is TRUE:

- a. Requiring Davis to provide the handwriting samples violated his Fifth Amendment privilege against self-incrimination.
- b. Requiring Davis to provide the handwriting samples violated his Sixth Amendment right to counsel.
- c. Requiring Davis to provide the handwriting samples violated his Fifth Amendment right to counsel under Miranda.
- d. Requiring Davis to provide the handwriting samples did not violate his Fifth Amendment privilege against self-incrimination.



**Answer to question 8.**

- a. Requiring Davis to provide the handwriting samples violated his Fifth Amendment privilege against self-incrimination.

**INCORRECT:** The Fifth Amendment privilege against self-incrimination applies only when the accused is compelled to make a testimonial communication that is incriminating. The privilege does not apply to non-testimonial evidence. “Testimonial” evidence is communicative in nature and comes from an individual’s thought processes, while “non-testimonial” evidence that which tends to identify a person, such as fingerprints and blood samples, and comes from an individual’s body. A handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic that is not protected by the Fifth Amendment privilege against self-incrimination.

- b. Requiring Davis to provide the handwriting samples violated his Sixth Amendment right to counsel.

**INCORRECT:** The Sixth Amendment right to counsel attaches when the “adversarial judicial process” begins. After this point, an accused is entitled to have counsel present at “critical stages” of the proceedings, to include post-indictment lineups, police questioning, and all court appearances. The Supreme Court has held that the taking of handwriting exemplars from an individual is not a “critical stage” of the proceedings that would entitle a suspect to the assistance of counsel under the Sixth Amendment.

- c. Requiring Davis to provide the handwriting samples violated his Fifth Amendment right to counsel under Miranda.

**INCORRECT:** The Supreme Court has repeatedly emphasized that Miranda warnings are due only when a suspect interrogated by the police is “in custody.” Here, Davis was not in custody at the time the handwriting samples were taken. Even if he were, the admission of the samples did not violate his Fifth Amendment rights, because the samples were non-testimonial in nature, and there is no Fifth Amendment protection for identifying characteristics.

- d. Requiring Davis to provide the handwriting samples did not violate his Fifth Amendment privilege against self-incrimination.

**CORRECT:** The Fifth Amendment privilege against self-incrimination applies only when the accused is compelled to make a testimonial communication that is incriminating. The privilege does not apply to non-testimonial evidence. A handwriting sample is non-testimonial evidence beyond the scope of the privilege against self-incrimination. Thus, a suspect may be required to provide handwriting samples, even when those samples will ultimately be used to “incriminate” the suspect.

9. Jones was indicted for bank robbery and arrested approximately two weeks later. At his initial appearance, an attorney was appointed to represent him. Two days later, a Federal agent, without notice to Jones' counsel, arranged to have two of the tellers observe a lineup of Jones and five other prisoners. All of the lineup participants were required to state, "Put the money in the bag." Both tellers identified Jones as the robber. At trial, Jones made a motion to suppress the results of the lineup, claiming that his Fifth and Sixth Amendment rights had been violated. According to the law, the motion will be:

- a. Granted, because the lineup violated Jones' Sixth Amendment right to counsel.
- b. Granted, because requiring Jones to say, "Put the money in the bag" violated his Fifth Amendment privilege against self-incrimination.
- c. Denied, because the lineup did not violate Jones' Sixth Amendment right to counsel.
- d. Denied, because requiring Jones to say, "Put the money in the bag" did not violate his Fifth Amendment privilege against self-incrimination.

### Answer to question 9.

- a. Granted, because the lineup violated Jones' Sixth Amendment right to counsel.

**CORRECT:** The Sixth Amendment right to counsel attaches when the "adversarial judicial process" begins. After this point, an accused is entitled to have counsel present at "critical stages" of the proceedings, such as during police questioning and at all court appearances. The Supreme Court has also determined that post-indictment lineups are "critical stages" for purposes of the Sixth Amendment. Thus, both Jones and his counsel should have been notified of the impending lineup, and the presence of Jones' counsel was required, absent a waiver of that right by Jones. The agent's failure to provide Jones an opportunity to have his counsel present during the post-indictment lineup was a violation of his Sixth Amendment right to counsel.

- b. Granted, because requiring Jones to say, "Put the money in the bag" violated his Fifth Amendment privilege against self-incrimination.

**INCORRECT:** Requiring Jones to say, "Put the money in the bag" did not violate Jones' Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination applies only when the accused is compelled to make a testimonial communication that is incriminating. The privilege does not apply to non-testimonial evidence. In this case, Jones' statement was non-testimonial. It was not what he said that was important, but the identifying physical characteristics of the speaker.

- c. Denied, because the lineup did not violate Jones' Sixth Amendment right to counsel.

**INCORRECT:** The Sixth Amendment right to counsel attaches when the "adversarial judicial process" begins. After this point, an accused is entitled to have counsel present at "critical stages" of the proceedings, such as during police questioning and at all court appearances. The Supreme Court has also determined that post-indictment lineups are "critical stages" for purposes of the Sixth Amendment. Thus, both Jones and his counsel should have been notified of the impending lineup, and the presence of Jones' counsel was required, absent a waiver of that right by Jones. The agent's failure to provide Jones an opportunity to have his counsel present during the post-indictment lineup was a violation of his Sixth Amendment right to counsel.

- d. Denied, because requiring Jones to say, "Put the money in the bag" did not violate his Fifth Amendment privilege against self-incrimination.

**INCORRECT:** Requiring Jones to say, "Put the money in the bag" did not violate Jones' Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination applies only when the accused is compelled to make a testimonial communication that is incriminating. However, the lineup itself was a violation of Jones' Sixth Amendment right to counsel. The Supreme Court has determined that post-indictment lineups are "critical stages" for purposes of the Sixth Amendment. Thus, both Jones and his counsel should have been notified of the impending lineup, and the presence of Jones' counsel was required, absent a waiver of that right by Jones.

10. Carter was arrested for selling heroin to an undercover officer. At the police station, two officers questioned him about the crime, although neither officer provided him Miranda warnings prior to the questioning. During this interrogation, Carter voluntarily admitted selling the heroin to the undercover officer. At a pretrial suppression hearing, the judge suppressed the confession given by Carter during his interrogation, finding that, while the confession was voluntarily given, the officers had violated Carter's Miranda rights. The government prosecuted Carter, relying upon the testimony of the undercover officer that Carter sold him heroin. In his defense, Carter took the witness stand and denied selling heroin to the undercover officer. During their rebuttal case, the government attempted to introduce Carter's confession, and Carter objected. According to the law, Carter's confession will be:

- a. Not allowed into evidence, because the statement was taken in violation of Miranda and cannot be used against the defendant during either the government's case-in-chief or the government's rebuttal case.
- b. Not allowed into evidence, because the officers' failure to provide Carter his Miranda warnings violated Carter's Sixth Amendment right to counsel.
- c. Allowed into evidence, because Carter's statement was given voluntarily, even though no Miranda warnings had been given.
- d. Allowed into evidence, because statements taken in violation of Miranda can be used to impeach a defendant so long as the statement was otherwise voluntary.

**Answer to question 10.**

- a. Not allowed into evidence, because the statement was taken in violation of Miranda and cannot be used against the defendant during either the government's case-in-chief or the government's rebuttal case.

**INCORRECT:** Statements inadmissible against a defendant in the prosecution's case in chief because of lack of Miranda warnings may be used for impeachment purposes to attack the credibility of a defendant's trial testimony, so long as the statements were otherwise voluntarily given. In this case, while the government could not use Carter's confession during their case-in-chief because of the Miranda violation, the government could use the confession to impeach Carter once he took the witness stand and gave testimony inconsistent with his prior statement.

- b. Not allowed into evidence, because the officer's failure to provide Carter his Miranda warnings violated Carter's Sixth Amendment right to counsel.

**INCORRECT:** The Sixth Amendment right to counsel is does not attach until a prosecution is commenced (i.e., at or after the initiation of adversarial judicial criminal proceedings, such as by way of indictment, information, or initial appearance). In this case, the officers did not violate Carter's Sixth Amendment right to counsel because no formal charges had yet been filed on the heroin charge.

- c. Allowed into evidence, because Carter's statement was given voluntarily, even though no Miranda warnings had been given.

**INCORRECT:** In Miranda, the Supreme Court held that certain warnings must be given before a suspect's statement made during a custodial interrogation could be admitted in evidence. This decision was based on the inherently coercive nature of custodial interrogations. Miranda created a presumption of coercion whenever a defendant's statement is obtained through interrogation initiated by the police after the defendant has been taken into custody or otherwise deprived of his freedom in any significant way. Thus, a statement given during a custodial interrogation is presumed to have been given involuntarily. This presumption can be overcome only by showing that a suspect was provided his Miranda warnings and waived his rights before the interrogation was conducted.

- d. Allowed into evidence, because statements taken in violation of Miranda can be used to impeach a defendant so long as the statement was otherwise voluntary.

**CORRECT:** Carter's confession was inadmissible against him during the prosecution's case-in-chief because of the Miranda violation that occurred. However, statements inadmissible against a defendant in the prosecution's case in chief because of lack of Miranda warnings may be used for impeachment purposes to attack the credibility of a defendant's trial testimony, so long as the statements were otherwise voluntarily given. In this case, the government could use Carter's confession to impeach him once he took the witness stand and gave testimony inconsistent with his prior statement.

11. Clark was arrested for the murder of his stepmother. He was read his Miranda rights, stated that he understood those rights, and then waived his rights. During the questioning that followed, Clark was asked by the interviewing officer about a number of pieces of evidence that pointed to him as the murderer. When the officer told Clark that his story didn't make sense, Clark replied, "Maybe I should talk to a lawyer." The officer continued his questioning of Clark, without clarifying whether or not Clark was invoking his right to counsel. Clark then confessed to the murder. Based on this confession, he was indicted for the murder. At his trial, Clark moved to suppress his statement, claiming that he had invoked his right to counsel when he stated, "Maybe I should talk to a lawyer," and that all questioning should have ceased at that point. Clark's motion to suppress the confession will be:

- a. Granted, because Clark's statement was an invocation of his right to counsel under Miranda.
- b. Granted, because the officer failed to clarify whether Clark was requesting counsel or not.
- c. Denied, because Clark's statement was not an invocation of his right to counsel under Miranda.
- d. Denied, because Clark did not have a right to counsel during the questioning because he had not yet been charged with the crime.

**Answer to question 11.**

- a. Granted, because Clark's statement was an invocation of his right to counsel under Miranda.

**INCORRECT:** If a suspect requests counsel at any time during an interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation with the officers. However, the suspect must unambiguously request counsel. He must state his desire to have counsel present with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be a request for counsel. If the statement fails to meet this requisite level of clarity, a police officer is not required to stop questioning the suspect. In this case, Clark's statement was not an unequivocal request for counsel, so the officer was not required to stop the interview.

- b. Granted, because the officer failed to clarify whether Clark was requesting counsel or not.

**INCORRECT:** In this case, Clark's request for counsel was ambiguous. The Supreme Court has noted that, when a suspect makes an ambiguous or equivocal statement, it will often be "good police practice" for the interviewing officers to clarify whether or not he actually wants counsel. Clarifying questions help protect the rights of the suspect by ensuring that he gets counsel if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. However, the Supreme Court does not require that officers ask clarifying questions. Thus, if the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

- c. Denied, because Clark's statement was not an invocation of his right to counsel under Miranda.

**CORRECT:** A suspect must unambiguously request counsel. He must state his desire to have counsel present with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be a request for counsel. If the statement fails to meet this requisite level of clarity, a police officer is not required to stop questioning the suspect. In this case, Clark's statement was not an unequivocal request for counsel, so the officer was not required to stop the interview.

- d. Denied, because Clark did not have a right to counsel during the questioning because he had not yet been charged with the crime.

**INCORRECT:** The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated, a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, the Supreme Court held in *Miranda v. Arizona* that a suspect subject to custodial interrogation has the right to consult with counsel and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. Here, Clark had no Sixth Amendment right to counsel, but because he was under arrest, he did have a right to counsel under Miranda.